

Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, AFL-CIO; and Associated General Counsel Contractors of California, Inc. and Stukel Rock & Paving, Inc., and Custom Rock Products, Inc.
Case 32-CE-39

10 August 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 2 April 1984 Administrative Law Judge George Christensen issued the attached decision. The Respondent Union filed exceptions and a supporting brief, and the counsel for the General Counsel filed an opposition to the Union's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent Associated General Contractors of California, Inc., and its affiliated Contractor-Employers, Oakland, California, its officers, agents, successors, and assigns, and Respondent Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, AFL-CIO, San Francisco, California, its officers, agents, and representatives, shall take the action set forth in the Order.

DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge. On December 1, 1983, I conducted a hearing at Oakland, California, to try issues raised by a complaint issued on July 20, 1983, based on a charge filed by Stukel Rock & Paving, Inc. and Custom Rock Products, Inc. (Stukel and Custom) on June 10, 1983, alleging Operating Engineers Local Union No. 3 (OE 3) and Associated General Contractors of California, Inc. (AGC) violated Section 8(e) of the National Labor Relations Act (Act), by entering into and giving effect to an agreement requiring the AGC affiliates covered by that agreement to engage only subcontractors subject to the terms of that agreement to perform work on any materials incorporated into a construction job or project.

OE 3 and AGC concede entry into and enforcement of the cited agreement, but plead such action is permissible under the first proviso to Section 8(e) of the Act.

Stukel, Custom, and the General Counsel respond that while the proviso permits such agreements with respect to onsite construction work, the agreement in question covers offsite work, and therefore is outside the scope of the proviso.

The issue for determination is whether the agreement is within the scope of the proviso.

The parties appeared by counsel at the hearing and entered into a stipulation of facts relevant and material to the issue. Counsel for the Charging Parties, the General Counsel and OE 3 also filed briefs.

Based on my review of the stipulation of facts, perusal of the briefs, analysis and research, I enter the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The complaint alleges, the answers admit, and I find at all pertinent times Stukel, Custom, AGC, and AGC's affiliates were employers engaged in commerce in a business affecting commerce and OE 3 was a labor organization within the meaning of Section 2 of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

About June 15, 1983, OE 3 and AGC entered into an agreement covering the wages, rates of pay, hours and working conditions of employees of contractors affiliated with AGC for a term extending from June 16, 1983, to June 15, 1986.

That agreement provided, inter alia, as follows:

This agreement shall . . . apply to the operation, modification, maintenance and repair of equipment covered by this agreement . . . established or in the production of borrow, riprap, rock, sand, gravel, aggregates of all kinds, concrete (excluding cement), asphalt, or macadam, or other road surfacing material (excluding oil), by an individual employer or a subcontractor, which is to be incorporated into specific jobs or projects of the individual employer, so long as such material is actually being produced or delivered to such job or project, and such work will be considered onsite.

In the performance of their construction contracts, the contractors covered by the agreement require materials known as borrow (undifferentiated soil used for fill), riprap (stone or rock used for loose walls or embankments), rock, sand, gravel, aggregates (gravel mixed with cement to form concrete), concrete, macadam and other road surfacing material.

The contractors sometimes utilize their own equipment, employees, and facilities to produce or process and deliver those materials and sometimes subcontract with other employers who are not parties to the agreement for such production or processing and delivery, which

those subcontractors perform with their own or another subcontractor's equipment and employees.

When a contractor covered by the agreement has subcontracted with another employer to supply materials to a single construction job or project the primary contractor has been engaged to perform and that subcontractor (or his subcontractor) uses his equipment and employees to produce or process the materials in question for delivery to the jobsite, OE 3 and AGC have construed and applied the agreement provision recited above as requiring that subcontractor to comply with all the terms and conditions of the AGC-OE 3 agreement, without regard to whether that equipment and those employees are producing or processing those materials at the jobsite, one-half mile from the jobsite, 5 miles from the jobsite, or over 20 miles from the jobsite.

Pursuant to that interpretation and application, when a contractor affiliated with AGC and covered by the agreement was engaged to perform a road-building project, subcontracted the work of providing certain materials for the project to Stukel and Stukel in turn retained Custom¹ to utilize Custom's equipment and employees in operating a rock-crusher at a location 2 miles from the road-building jobsite to process some of the required materials for delivery to the jobsite, OE 3 demanded that Stukel/Custom comply with the terms of the AGC-OE 3 agreement; i.e., that Stukel/Custom perform the work of operating, maintaining and repairing the equipment utilized in its material producing or processing work with employees represented by OE 3 and receiving the rates of pay, wages, hours and conditions set out in the AGC-OE 3 agreement.²

B. Positions of the Parties

1. The General Counsel and the Charging Parties

The General Counsel and the Charging Parties contend it is unlawful under Section 8(e) of the Act for any union and employer to enter into an agreement wherein the employer agrees to limit his subcontracts to employers whose employees are covered by agreements with the Union, unless the agreement is strictly limited to subcontracts for the performance of work directly at the site of a construction project; that the AGC-OE 3 agreement is not limited to onsite construction work and is therefore unlawful.

2. OE 3³

OE 3 contends work on materials which are incorporated into a construction job or project properly may be classified as onsite construction work and therefore the AGC-OE 3 agreement is lawful under the first proviso to Section 8(e) of the Act.

¹ Neither Stukel nor Custom was AGC affiliate subject to the terms and conditions of AGC-OE 3 agreement, nor signatory thereto.

² The employees assigned to the work in question were neither represented by OE 3 nor received the rates of pay, wages, hours, and working conditions set out in the AGC-OE 3 agreement.

³ While AGC entered an appearance in this case, filed an answer denying the basic allegations of the complaint, and entered into the stipulations which formed the basis for the findings of fact recited heretofore, AGC did not argue orally or file a brief.

C. Analysis and Conclusions

Section 8(e) of the Act prohibits an employer and a union from entering into and giving effect to an agreement in which the contracting employer agrees to cease or refrain from doing business with another employer.

The first proviso to the section permits an employer and a union in the construction industry to enter into and give effect to such an agreement, however, providing the agreement relates to "the contracting or subcontracting of work to be done *at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . .*" (Emphasis added.)

Congress made clear the exemption was limited to onsite construction work⁴ and certainly that it did not cover the transport and delivery of materials to a construction site, saying

It should be particularly noted that the proviso relates only and exclusively to the contracting or subcontracting of work to be done at the site of the construction. The proviso does not exempt from Section 8(e) agreements relating to supplies or other products or other materials shipped or otherwise transported to and delivered on the site of the construction.⁵

In a series of cases, the Board (with court approval) has ruled the proviso not only does not extend to the transport and delivery of materials to a construction site, it does not extend to the operation of a concrete mixer brought to a construction site by a materials deliverer or the operation of a truck utilized at a construction site to lower precast concrete pipe sections into a trench;⁶ warranty repair work on machinery performed "near" a construction site;⁷ the loading and unloading of materials scheduled for delivery to a construction site at a storage location 20 miles distant from that site;⁸ the operation of equipment for the purpose of excavating and screening materials scheduled for delivery to a construction site at a location 40 miles from that site;⁹ etc.

The Stukel/Custom charge which led to the issuance of the instant complaint was filed when OE 3 claimed an AGC affiliated contractor-employer violated the AGC-OE 3 agreement by subcontracting the work of processing materials to be used in the affiliate's construction project at a location 2 miles from the construction site to a subcontractor whose employees were neither represented by OE 3 nor compensated in accord with the wages, rates of pay, etc. contained in the AGC-OE 3 agreement. AGC and OE 3 also stipulated they had en-

⁴ On the theory permitting such agreements would reduce work stoppages or other disruptions within the industry caused by friction between employees represented by unions and covered by agreements between their employer and union and nonrepresented employees if required to work side by side on a construction project or job.

⁵ H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 39, 1 Leg. Hist. 943 (LMRDA 1959).

⁶ *Teamsters Local 42 (Inland Concrete)*, 225 NLRB 209 (1976).

⁷ *Operating Engineers Local 701 (Oregon-Columbia Chapter, AGC)*, 216 NLRB 233, (1975), *enfd.* 578 F.2d 841 (9th Cir. 1978).

⁸ *Boilermakers Local 92 (Bigge Drayage)*, 197 NLRB 281 (1972).

⁹ *Operating Engineers Local 12 (Robert E. Fulton)*, 220 NLRB 530 (1975).

tered into and attempted to enforce an agreement requiring AGC's affiliates to limit their subcontracts for the performance of such offsite work to subcontractors whose employees were represented by OE 3 and covered by an agreement with OE 3 containing all the terms and conditions of the AGC-OE 3 agreement.

On the basis of the language of the statute, its legislative history, the case law recited above and the facts set out above, I find and conclude the AGC-OE 3 agreement on its face and as interpreted and applied by the parties was and is an unlawful attempt by AGC and OE 3 to require AGC's affiliated contractor-employers to cease or refrain from doing business with contractors or subcontractors performing work away from or off the site of the construction jobs or projects AGC's affiliated contractor-employers have undertaken, such agreement is violative of Section 8(e) of the Act, it is not within the exception there to set out in the first proviso to Section 8(e), and it is unenforceable and void.

CONCLUSIONS OF LAW

1. At all pertinent times AGC, its affiliates, Stukel and Custom were employers engaged in commerce in a business affecting commerce and OE 3 was a labor organization within the meaning of Section 2 of the Act.

2. AGC and OE 3 violated Section 8(e) of the Act by entering into and enforcing an agreement requiring AGC's affiliates to limit their contracts for materials for use on their construction jobs or projects to contractors or subcontractors who are or agree to become party to an agreement with OE 3 covering their employees assigned to perform work away from or off the site of the construction job or projects in which the AGC affiliate is engaged.

3. The aforesaid unfair labor practice affects commerce as defined in Section 2 of the Act.

THE REMEDY

Having found OE 3 and AGC violated the Act, I recommend they be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

Respondent Associated General Contractors of California, Inc., and its affiliated Contractor-Employers, Oakland, California, its officers, agents, successors, and assigns, and Respondent Operating Engineers Local Union No. 3, San Francisco, California, their officers, agents, and representatives, shall

1. Cease and desist from entering into, maintaining, giving effect to or enforcing those provisions of their

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

collective-bargaining agreement to the extent found unlawful herein.

2. Take the following affirmative action designed to effectuate the purposes of the Act.

(a) Respondent Associated General Contractors of California, Inc. and its affiliated contractor-employers shall post at their offices copies of the attached notice marked "Appendix A."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by AGC's authorized representative shall be posted by AGC and its affiliates immediately after receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by AGC to ensure the notices are not altered, defaced, or covered by any other material.

(b) Respondent Operating Engineers Local 3 shall post at its offices and meeting halls copies of the attached notice marked "Appendix B."¹² Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by Local's 3 authorized representative, shall be posted by Local 3 immediately after receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by Local 3 to ensure that the notices are not altered, defaced, or covered by any other material.

(c) AGC and Local 3 shall notify Stukel Rock & Paving, Inc. and Custom Rock Products, Inc. that they have no objection to their employment by any contractor affiliated with AGC as contractors or subcontractors on any construction jobs or projects undertaken by any AGC affiliated contractor and that neither Stukel nor Custom need recognize Local 3 as the representative of their employees nor agree to pay the wages, rates of pay, or observe the conditions of any agreement between AGC and Local 3 as to any of their employees performing work away from or off the site of any project or job in producing or processing materials for incorporation within such project or job.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

¹¹ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹² Id.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT enter into, maintain, give effect to or enforce clauses in our agreement with Operating Engineers Local 3 limiting our affiliates to contracting or subcontracting with contractors or subcontractors who rec-

ognize Local 3 as the representative of their employees and agree to comply with the terms of our agreement with Local 3, with respect to contractors or subcontractors whose employees do not operate, modify, maintain, or repair equipment at the site of the construction job or project the contracting affiliate has agreed to perform.

WE WILL notify Stukel Rock & Paving, Inc. and Custom Rock Products, Inc. that we and our affiliates have no objection to their employment on any construction jobs or projects our affiliates have undertaken and that neither of them shall be required to recognize Local 3 as the representative of their employees nor agree to pay the wages, rates of pay, and other conditions set out in our agreement with Local 3 as to any of their employees assigned to perform work on that contract away from or off the site of the construction project or jobs our affiliate has undertaken.

ASSOCIATED GENERAL CONTRACTORS OF
CALIFORNIA, INC.

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT enter into, maintain, give effect to or enforce clauses in our agreement with Associated General Contractors of California, Inc. requiring its affiliates to limit their contracts to contractors or subcontractors whose employees are represented by us and covered by an agreement with us, so long as the employees of such contractors or subcontractors are operating, modifying, maintaining or repairing their employer's equipment away from or off the site of any construction job or project of the contracting AGC affiliate.

WE WILL notify Stukel Rock & Paving, Inc. and Custom Rock Products, Inc. that we have no objection to their employment by an AGC affiliate and that we neither seek nor demand recognition as the representative of their employees nor coverage of their employees under our agreement with AGC, with respect to employees performing work away from or off the site of any construction job or project.

OPERATING ENGINEERS LOCAL UNION NO.
3 OF THE INTERNATIONAL UNION OF OP-
ERATING ENGINEERS, AFL-CIO